

RECENT DEVELOPMENTS IN SINGAPORE ON INTERNATIONAL COMMERCIAL ARBITRATION

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This report is the second installment in a series of yearly updates that began in 2005 to track and follow the developments in arbitration law in Singapore. It is part of an ongoing effort to develop the arbitration jurisprudence and the Singapore case law database. There have been several notable cases since the last review that address issues relating to the interpretation and implementation of the Arbitration Act and the International Arbitration Act. In particular, they deal with intricate questions relating to the differences between the domestic and international regimes, stay of proceedings, bases for setting aside arbitral awards, the relationship between appointing authorities and arbitral rules and the differences between pre-action and pre-arbitral discovery processes.

I. INTRODUCTION

A year ago, in my first review, I predicted that arbitration jurisprudence and the Singapore case law database will continue to grow yearly. The cases that have arisen in the year since bear that out. The general tenor of the cases continues to bear out the policy that the arbitration process and the arbitrator's authority should be respected to the extent agreed upon by the parties; and that the grounds for removal of the arbitrator and the bases for arbitral decisions to be set aside should be limited and stringent.¹ They also respect

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¹ See *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* [2005] 3 Sing.L.R. 512, a domestic arbitration case, where an action for the removal of the arbitrator failed despite allegations of improper conduct and excess exercise of power under Sections 16(1)(b) and 22 of the Arbitration Act and Articles 5.1 and 12.1(c) of the applicable arbitration rules respectively. For instance, removal due to "improper conduct" was subject to the high threshold requirement that it had caused "substantial injustice", which in this case the applicant failed to surmount. Mere loss of confidence was an insufficient basis. The judge also affirmed the arbitrator's "wide discretion in reaching his decisions as to what the duty of acting fairly demanded in the circumstances of a given case" (paras. 25-26). See also, *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd* [2005] 2 Sing.L.R. 270, a domestic arbitration case. The outcome of this case was mixed. On several of the appellant's complaints in its application for various reliefs, the judge held that the arbitrator had not misconducted himself, but that he did on others. For example, in relation to matters relating to and based upon the arbitrator's findings of fact, the arbitrator's findings were conclusive. However, the arbitrator was found to have misconducted himself on other matters including the omission to give reasons for his conclusions and for adopting the wrong method of computation. Those matters were thus remitted to the arbitrator for consideration. The judge in this case reaffirmed the established principle that arbitral awards cannot be set aside on the basis of a mistake or error of fact alone and that it did not constitute misconduct for the purposes of the AA. However, leave to appeal can be given for the determination of questions of law for domestic arbitration, which "would add to the clarity and certainty of Singapore law" (at para. 71). See also the *Dexia Bank* case, *infra* note 28, an international arbitration case.

the “spirit and scheme of arbitration”, which is based upon the parties’ choice and the independence of the arbitration process and the arbitral tribunal.²

In fact, judges have taken care to consider arbitration issues even if deemed “academic”,³ and have often taken the effort to canvass arbitration jurisprudence of other common law countries and local precedents (whether *ratio* or *obiter*) to explain or support the position to be taken in Singapore.⁴ They have also sought to explain arbitral concepts and the differences between the arbitration process and functionalities on the one hand, and other forms of dispute resolution on the other.⁵

II. THE CASES

The following are selected cases that address issues relating to the interpretation and implementation of the *Arbitration Act*⁶ (AA) and the *International Arbitration Act*⁷ (IAA) provisions as well as other aspects of arbitration laws.⁸

A. *When Can an Action be Stayed Under Section 6(2) of the AA and the IAA and What is the Scope of Judicial Discretion and Scrutiny Under Section 6(2) of the AA as Compared to the IAA?*

Often, the “trigger” for a proper commencement of arbitration pursuant to an arbitration agreement or clause is a “dispute” and/or a “differences” between the parties to the underlying contract or transaction.⁹ For example, under section 6(1) of the IAA, court proceedings initiated “in respect of any matter which is the subject of the [arbitration] agreement” are

² See the *Woh Hup* case, *infra* note 50 at para. 36. The court found that it was unnecessary on the facts of the case to consider if it had the jurisdiction to order pre-arbitral discovery (whether as an inherent power or under the Rules of Court). However, it appeared to doubt that there was such a power on the basis that matters submitted to arbitration should be dealt with first by the arbitral tribunal, with the court stepping in only to the extent that its assistance is required and sanctioned by law.

³ See the *Dalian Hualiang* case, *infra* note 12 at para. 31.

⁴ *Ibid.*

⁵ For example, the judge in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2005] S.G.H.C. 224, went into detail in explaining the differences between expert determination and arbitration. For instance, a fundamental difference is in the procedure and in the absence of remedies for procedural irregularity in expert determination. Also, an expert’s determinations are enforceable as contractual bargains both inside and outside the jurisdiction. His decisions can only be set aside if his terms of appointment are breached or for fraud or partiality. Another notable difference is that an expert can (and is often expected to) use and apply his personal expertise and to make his own inquiries without any obligation to seek other views, and is also not obliged to make a decision on the basis of the evidence presented to him (*i.e.* he can act based on his subjective opinion). However, the final scope of the power, duties and functions of both the expert and the arbitrators is still to be determined by the parties under their terms of appointment (paras. 33-39).

⁶ Cap. 10, 2002 Rev. Ed. Sing.

⁷ Cap. 143A, 1994 Rev. Ed. Sing.

⁸ It is to be noted that the domestic and international arbitral regime are different in some aspects, with the latter enjoying greater party and arbitrator autonomy.

⁹ It is a well-established principle that if the court finds that there is no dispute between the parties where a dispute is a condition precedent for an arbitration to be initiated, then there are no sufficient grounds to stay court proceedings under Section 6 of the Arbitration Act; *Multiplex Constructions Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 Sing.L.R. 530. The burden of proof is on the party resisting the stay of proceedings to show that the other party had no defence to the claim (paras. 5-6).

to be stayed “so far as the proceedings relate to that matter”.¹⁰ The “matter” refers to the triggering incident, which directly relates to the contract in question (the “subject”). Hence, it would seem to suggest that in the case of an arbitration agreement or clause that refers a dispute and/or differences between the parties to arbitration, it is the “realness” or “genuineness” of that very dispute and/or differences that the court before which the action is brought must determine before it can stay the action for arbitration. Otherwise, what may well happen is that an action is stayed in a matter that is, at the same time, not ripe for arbitration (falling outside the scope of the jurisdictional limits of the arbitration mandate). That was determined to be the case in relation to Section 6(2) of the AA. However, it appears that section 6(2) of the IAA requires an almost automatic staying order.¹¹ The argument in support for this is that the arbitration tribunal can determine whether it has jurisdiction under the *competenz-competenz* principle, and that a matter that is not susceptible to arbitration or outside the scope of the arbitration agreement, can still be returned to the courts for resolution (and hence not deprived of its day in court).

In *Dalian Hualiang Enterprise Group Co Ltd and Another v Louis Dreyfus Asia Pte Ltd*,¹² the first plaintiff, Dalian Hualiang Enterprise (DHE) entered into a contract with the defendant, Louis Dreyfus Asia (LD). The former later assigned its rights and obligations under the contract to the second plaintiff, Dalian Jinshi Oil-Making Co Ltd (DJOM). Subsequently, DJOM made two claims under the contract against LD. Sally Yang of LD’s China offices admitted certain sums to be payable on DJOM’s claims and the plaintiffs filed an action against LD for those sums. LD applied for a stay of the action pursuant to the arbitration agreement in the contract. A central issue in the case was whether Sally Yang had the authority to bind LD, and hence, whether she was an employee of LD (the authority issue). There was also the issue of whether LD could set-off the plaintiffs’ claim (if successful) against its claim based upon another contract with a company that LD alleged was part of the group of companies that included both plaintiffs insofar as the running account was concerned (the set-off issue). On the basis that there was a dispute between the parties over the above issues, the assistant registrar decided to stay the action on the basis of section 6(1) of the IAA since the matter was not capable of court resolution.

The plaintiffs, however, appealed against that decision. The parties’ contentions necessarily involved a consideration of the court’s role under section 6(2) of the IAA, which states that the court to which an application for a stay is sought under subsection (1) “shall make an order” staying the proceedings “so far as the proceedings relate to the matter”.¹³ According to the plaintiffs, the court had the jurisdiction and obligation to determine if the case brought before it related to the subject of the arbitration agreement between the parties. On the contrary, the defendant argued that the court was obliged to refer any dispute to arbitration so long as there was a dispute. Whether there was a dispute and the court’s role in determining its existence and genuineness (as a fact) was potentially relevant to both of the issues in question.¹⁴

¹⁰ Section 6(1) of the IAA is a modified version of Article 8(1) of the UNCITRAL Model Law on Commercial Arbitration (adopted by the United Nations Commission on International Trade Law on 21 June 1985 as United Nations document A/40/17, Annex I), which states the stage when an application for a stay can be made is “[when] a party so requests not later than when submitting his first statement on the substance of the dispute”. Section 6(1) and Article 8(1) lay out the procedural requirements for a stay application, which is a condition precedent for the court before which proceedings are brought to render a stay.

¹¹ “[U]nless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.” (last para. to Section 6(2) of the IAA).

¹² [2005] 4 Sing.L.R. 646.

¹³ “[U]nless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed” (Section 6(2) of the IAA).

¹⁴ To put it in another way, the question was whether the court or the arbitral tribunal should be the appropriate authority to determine whether the court proceedings were in respect of a matter which was the subject of an arbitration agreement.

The High Court judge held that the court had no jurisdiction to order a stay under section 6(2) of the IAA if the court proceedings were not in respect of a matter which was the subject of the arbitration agreement. As such, it is necessary for the court to determine if the matter before it was the subject of the arbitration agreement between the parties. However, to restrain residual judicial discretion and avoid undue interference with the arbitral regime, the judge qualified that if the issues were arguable in that the outcome was not clear, then the court should stay the proceedings anyway.¹⁵

The judge proceeded to determine that on the facts, the merits of the authority issue were clearly in favour of the plaintiffs as there were independent admissions from LD besides the one coming from Sally Yang.¹⁶ The judge also determined that the set-off issue was not the subject of the arbitration agreement at all as the parties and contracts were distinct.¹⁷

On the matter relating to the “dispute” as the triggering incident, as was the case here, the court had to consider if it had any discretion to determine the genuineness of a dispute before deciding to order a stay.¹⁸ On this question, the court’s approach to the domestic and international regimes diverged at a divider on the dual carriage arbitral highway. Under section 6(2) of the IAA, the court was not to consider if there was in fact a dispute or whether there was a “genuine dispute”.¹⁹ Instead, under section 6(2) of the AA, the court might determine if there was in fact a dispute before deciding to order a stay,²⁰ although “the court should not examine the validity of the dispute as though the stay application was an application for summary judgment.”²¹

This case once again highlights subtle differences between the domestic and international arbitration regimes. The latter enjoys more independence and a hand-off approach from the courts than the former, even at the point of initiation. There is a greater willingness on the part of the courts to consider merits in cases meant for domestic arbitration rather than those that are slated for international arbitration for which the concept of “minimal court involvement” reaches its lowest limits.

Another lesson is that if the parties indeed require a “real” or “genuine” dispute as a valid incident to trigger arbitration (and hence provide the basis for a stay), then they should clearly state it as a requirement under the arbitration agreement rather than use the terms “all dispute” or “any dispute”.²²

Even if there is no need to examine the genuineness of a “dispute” under section 6(2) of the IAA, the party seeking arbitration should ensure that there is some evidence of a dispute (such as making a “positive assertion”) because the existence of one may be in issue. As the judge noted in this case, a simple refusal to pay or silence may not even amount to a dispute.²³

¹⁵ *Supra* note 12. at para. 25.

¹⁶ *Ibid.* at para. 14.

¹⁷ Even giving the phrase “any dispute” under the arbitration agreement “a wide interpretation” does not extend to covering a dispute unrelated to the subject of the agreement, which in this case was the contract, *supra* note 12 at paras. 29-30.

¹⁸ This portion of the judge’s decision appears to be *obiter dicta* given the prior determination in relation to the subject. *Supra* note 12 at para. 31.

¹⁹ The plaintiffs argued that in order for a dispute to be capable of being referred to arbitration there must be an arguable case for disputing the claim, and if the defence was bad then there was no real or genuine and hence no triggering incident for arbitration. The defendants, on the other hand, argued that even a simple refusal to pay on a contract upon demand could constitute a dispute for the purposes of the agreement giving rise to a valid basis for arbitration proceedings to be commenced (and consequently, there was no basis for the court not to grant a stay). The judge preferred the latter argument based on the literal interpretation of the terms of the agreement and the ordinary meaning of the words used.

²⁰ On the basis of “no sufficient reason” under Section 6(2) of the AA.

²¹ *Supra* note 12 at para. 74.

²² *Supra* note 12 at para. 39.

²³ The judge went further to opine that an admission by a defendant would, generally speaking, be contrary to a dispute, but qualified that not every admission would necessarily avoid a stay order; *supra* note 12 at para. 75.

B. Do the Courts have Jurisdiction to Stay Proceedings and Order Parties to Arbitrate Where no Arbitration Agreement Exists Between the Parties, and Should a Court Stay Proceedings and Order Parties to Arbitrate Where a Prior Related Matter Between Similar Parties was Referred to Arbitration?

Still on the matter of stay proceedings, in the case of *Yee Hong Pte Ltd v Tan Chye Hee Andrew (Ho Bee Development Pte Ltd, Third Party)*,²⁴ the High Court considered the issue of whether the court had discretion under section 6(5) of the AA to order an arbitration in the absence of an arbitration agreement, and if so, the circumstances in which that was appropriate.

The case involved a dispute between the plaintiff, which was the main contractor of a condominium project, and the defendant, which was its architect. A third party, the developer, was joined to the action by the defendant. As is customary in construction contracts, there were arbitration clauses in the various contracts relating to the same project. Both the main contract entered into between the plaintiff and the third party and the contract between the defendant and the third party contained arbitration clauses. The plaintiff sued the defendant for breach of contract (*i.e.*, his duties as the architect). The third party sought a stay so that the matter may be referred to arbitration as the matter was related to an earlier dispute between the plaintiff and the third party, but the application was refused by the assistant registrar. The third party appealed that decision to the High Court.

The judge held that section 6(5) of the AA empowered the court to stay an action and order the parties to arbitrate their dispute despite the absence of an arbitration agreement where the dispute arose out of the same subject, which was previously arbitrated upon and involved the same parties.²⁵ In this case, the judge found that as the defendant was making a claim for an indemnity or contribution through or under the third party (by third party proceedings), the defendant was a party to the arbitration agreement between the main contract plaintiff and the third party that contained an arbitration agreement. Moreover, it would be consistent and highly unsatisfactory otherwise, for two disputes that arose out of the same subject, in this case the project, to be resolved in the same forum.²⁶ Not only would it determine the whole dispute amongst all the parties involved, it would also save time and costs.²⁷

C. An Examination of the Grounds for Setting aside under Article 34(2)(a)(ii)(iii) and (b)(ii) of the UNCITRAL Model Law (i.e., Public Policy, Jurisdiction and the Right to Present a Case); Section 24(b) of the IAA (i.e., Natural Justice) and the Meaning and Effect of the “Final and Binding” Principle Under Section 19B(1) of the IAA.

*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*²⁸ was a case where the applicant sought to set aside an arbitral award on several bases, namely: (a) that the award was in conflict with the public policy of Singapore; (b) that the award dealt with disputes or issues not contemplated by, or not falling within, the terms of the submission to arbitration; (c) that a breach of natural justice had occurred in connection with the making of the award by which the rights of the applicant had been prejudiced; and (d) that the applicant was not given a full opportunity to present its case or was otherwise unable to present its case.

²⁴ [2005] 4 Sing.L.R. 398.

²⁵ Section 6(5) of the AA states that for the purposes of that section, “a reference to a party includes a reference to any person claiming through or under such party”; *ibid.* at paras. 25-27. Section 6(5) of the IAA contains an equivalent provision.

²⁶ *Supra* note 24 at para. 30; A “more suitable” forum.

²⁷ *Supra* note 24. at para. 27.

²⁸ [2006] 1 Sing.L.R. 197.

There are several points to note in relation to this case. First, the court's decision continues to reflect the attitude that strong reasons are required for an arbitral award to be set aside, and that the usual attempts to do so based on a multitude of grounds do not necessarily increase the chances of success. Second, the judge took the opportunity to clarify the meaning and effect of the grounds for setting aside as contained in Article 34(2) of the *UNCITRAL Model Law* (which is given force of law in Singapore via the IAA), which will provide further guidance on the appropriateness of bringing an action for setting aside on those grounds based on the same or similar arguments in the future.

The applicant, a state-owned entity of the Republic of Indonesia, guaranteed notes issued by Rekasaran BI Ltd and others (the issuer). The respondent was a bank that held one of the notes issued by the issuer. The applicant took steps to restructure its obligations to all holders of the issuer's notes after obtaining the approval of a majority of the holders of notes at a February 2000 meeting. The respondent and other minority holders opposed the move and commenced arbitration proceedings against the issuer and the applicant in the Singapore International Arbitration Centre (SIAC) (first arbitration). The arbitral tribunal of the first arbitration (first tribunal) issued an award in favour of the respondent (first award). Meanwhile, another meeting was held in June 2001 to ratify the resolutions passed at the February 2000 meeting. In August 2001, the first tribunal was sent a note of the June 2001 meeting.

On 10 January 2002, the applicant commenced arbitration proceedings against the respondent and the other minority holders (second arbitration). The respondent applied to the second tribunal to try certain preliminary issues concerning its jurisdiction. The second tribunal issued an award (second award) determining the preliminary issues, after considering the written submissions of the parties but without calling for an oral hearing. The applicant then brought the case before the courts, seeking to set it aside under Article 34(2) of the *UNCITRAL Model Law* on the abovementioned grounds. However, the court dismissed its motion on all grounds on the following bases.

On the public policy issue, the applicant's only grouse was that parts of the second award contradicted the first award thereby ignoring the principle that an arbitral award is "final and binding" under section 19B(1) of the IAA. Therefore, on this ground alone, the applicant sought to evoke the public policy ground for a setting aside of the second award. The judge held that although a matter of public policy may be expressed by law (*e.g.*, through legislative enactment), they are not the same thing although there is the possibility of overlap. There may be laws that do not give force to public policy and, *vice versa*, there may be public policy that may not be given the force of law. An example the judge gave was the generally accepted position in the law on arbitration that awards cannot be set aside on the basis of a mistake of law.²⁹ In the context of a string of private arbitration proceedings dealing with the same parties and dispute, a conflict in awards on the facts and circumstances of this case did not amount to something that was in conflict with the public policy of the State so as to be susceptible to setting aside under Article 34(2)(b)(ii) of the *UNCITRAL Model Law*.³⁰ Nevertheless, if there was such a state of contradictory decisions breaching section 19B(1), the proper procedure was to challenge the jurisdiction of the second tribunal before the tribunal,³¹ and then before the court under Article 16(3) and Article 34(2)(a)(iii) of the *UNCITRAL Model Law*.

²⁹ *Ibid.* at para. 29.

³⁰ The judge spoke about the reasons for, and effects of, Section 19B(1) at para. 30.

³¹ Or in the event that subsequent proceeding has not yet begun or has yet to be concluded, to seek an injunction for discontinuance; *supra* note 28 at para. 30. The judge stated that "[t]he purpose of s[ection] 19B(1) of the Act was to make it clear and beyond dispute that each party to an international arbitration was bound by the award made by the tribunal and could not challenge it except on the limited grounds set out in the Act and the Model Law. If the same issue was dealt with for a second time in further arbitration proceedings, the second set of proceedings might be considered to be in breach of s[ection] 19B(1), and the remedy for the aggrieved party was either to challenge the jurisdiction of the second tribunal or to obtain an injunction against the continuation of the second set of proceedings".

On the basis that the second tribunal did not have the power to decide certain issues that had already been decided by the first tribunal,³² the judge decided that the second tribunal had come to a conclusion that was contrary to the opinion of the first tribunal, which it was not entitled to do.³³ However, as only that part of the award which contained decisions on matters beyond the scope of the submission to arbitration might be set aside according to Article 34(2)(a)(iii) of the *UNCITRAL Model Law*, the judge severed the contradictory finding after deciding that it did not affect the final decision of the second tribunal.³⁴ The finding of estoppel could not be challenged on this ground.³⁵

On the accusations relating to the conduct of the arbitration, the applicant argued that there was a breach of natural justice,³⁶ and that the applicant lacked the opportunity to present its case.³⁷ However, the judge found there to be no substance to the applicant's complaints on the evidence before him. The judge held that the applicant had been given a full opportunity to present its case on the jurisdictional issue and that there was no evidence that the second tribunal had any ground for wondering whether the applicant fully appreciated what was being put against it. Moreover, even though the tribunal made an issue of a point that was never raised by either party, which related to the contradictory findings between the tribunals; because that finding was not determinative of its final conclusion, breach of natural justice had not occurred such as to prejudice the applicant.³⁸ On the ground that there was no due process, the judge found that the parties' conduct had rendered earlier directions contemplating an oral hearing of submissions ineffective. Moreover, when further directions were given for the filing of submissions by both parties, there was no direction that there would be a hearing thereafter at which oral submissions would be made. Also, neither party asked for an oral hearing. Hence, the applicant was not entitled to complain that it was not given the chance to orally address any concerns that the second tribunal might have had after reading both parties' submissions.³⁹

D. Can an Appointing Authority and the Arbitral Rules Provider Differ and can Rules Apply Independent of the Institution Serving as the Administrator?

In the case of *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd and Another Application*,⁴⁰ a dispute over a claim for payment of a sum was brought to arbitration. At issue was whether the SIAC was the administrator and appointer of the arbitrator. The relevant arbitration clauses stated that unless agreed otherwise, the arbitrator was to be "appointed by the President of the Institute of Architects in Singapore (or such other body as carries on the functions of the Institute) or his nominee", and that the arbitrator must conduct the proceedings in accordance with the *SIAC Rules*.⁴¹ The issue turned on contractual interpretation and the apparent conflict between the above two provisions.

³² The issue related to the view of the second tribunal that the applicant had participated to a limited extent on the first arbitration, which was in contradiction to the opinion of the first tribunal. In contrast, the second tribunal's finding that the June 2001 meeting would have been relevant for the first tribunal's consideration had it been raised by the applicant as an issue was held not to contradict the latter's findings as it stated that the note of the June 2001 meeting was irrelevant to the issues requiring determination in the first arbitration; *supra* note 28 at paras. 40-41.

³³ *Supra* note 28 at paras. 35-38.

³⁴ To the effect that the applicant was estopped from raising the issue of the June 2001 meeting in the arbitration.

³⁵ *Supra* note 28 at para. 42.

³⁶ See Section 24(b) of the IAA.

³⁷ See Article 34(2)(a)(ii) of the *UNCITRAL Model Law*.

³⁸ *Supra* note 28 at paras. 43-50.

³⁹ *Supra* note 28 at paras. 51-52.

⁴⁰ [2005] S.G.H.C. 91.

⁴¹ *Ibid.* at paras. 13.3.2-13.3.3.

The defendant had submitted a notice of arbitration to the SIAC pursuant to the *Domestic Rules* and sought to have the arbitrator appointed by the SIAC pursuant to its institutional rules as the parties could not agree on an arbitrator.⁴² The plaintiff disputed that a domestic dispute necessarily meant that the reference to *SIAC Rules* was to its *Domestic Rules* or even that the dispute had to be administered by SIAC and appointment made by the chairman of SIAC.

The judge held that “[i]t is in accordance with the principle of party autonomy that the parties were free to choose one body as their appointing authority and another body as their rules provider”,⁴³ or “how their arbitral tribunal is to be constituted and how the arbitration proper is to be conducted.”⁴⁴ Hence, she determined that even though the arbitration clause stated that the arbitrator *must* apply the *SIAC Rules*,⁴⁵ the non-reference to which set of rules was applicable made it such that it was a matter for the arbitrator to decide which rules he would like to use once he had been appointed by the proper appointing authority.⁴⁶ The arbitrator must be appointed according to the parties’ agreement, which was joint appointment, the failure of which will lead to an appointment by the Singapore Institute of Architects. Also, the failure to mention the appointment of SIAC as the institution of choice meant that the parties did not agree to its selection at the point of drafting and hence an *ad hoc* arbitration must have been intended.⁴⁷

Once again, careful drafting is essential to avoid conflict of arbitration provisions and the necessity to reconcile them.⁴⁸ Also, specific provisions appear to take precedence over general terms. Moreover, it would be easier to appoint the institutional authority that produced the set of rules adopted, and in particular to specify which set of rules if there are several; although it does not mean that selecting a set of rules implies the choice of institution or even institutional (as opposed to *ad hoc*) arbitration.⁴⁹ Finally, the courts will attempt as much as possible to give effect to the parties’ real intentions, or if that cannot be determined, at least what they would have intended if they had put their minds to the matter at the point in time when the arbitration provisions were being drafted.

⁴² The judge determined that this was a domestic dispute based on the fact the parties were incorporated and had their places of business in Singapore at the conclusion of the arbitration agreement, and that a substantial part of the obligations of the commercial relationship were to be performed in Singapore (involving a construction project in Singapore). This was the test for determining whether a dispute was domestic under the Domestic Rules. The fact that it was a domestic dispute was not disputed.

⁴³ *Supra* note 40 at para. 19. The judge also noted at para. 20 that the provisions in the SIAC Domestic Rules may in some situations constitute “an unwarranted limitation on party autonomy” by stating that the parties’ agreement to submit or to refer their dispute to the SIAC for arbitration also means that they agree that the Domestic Rules will take precedence over any and all provisions in the underlying contract between them that related to dispute resolution by arbitration. For example, it prevents the parties from selecting anyone other than the chairman of the SIAC as the default appointer of an arbitrator irrespective of any contrary indication in the underlying contract (which, in this case, was the Singapore Institute of Architects). There were also conflicts with the way arbitrator fees were to be determined under the Singapore Institute of Architects’ conditions of appointment on the one hand and under the SIAC Rules on the other.

⁴⁴ *Supra* note 40 at para. 18.

⁴⁵ *Supra* note 40 at para. 13.

⁴⁶ In such a case, the rules do not run the arbitration, but rather the arbitrator uses the rules as his instrument to facilitate the smooth conduct of the arbitration pursuant to Section 23(1) and (2) of the AA.

⁴⁷ *Supra* note 40 at para. 21.

⁴⁸ The judge was critical of the bad drafting in this case at para. 17. She even made drafting suggestions by referring to the recommended arbitration clause by SIAC; *ibid.*

⁴⁹ This problem would not arise if rules of facilitative authorities were adopted. Moreover, institutional rules tend to contain provisions that relate to institutional functions.

E. *What are the Circumstances in Which the Court May Grant or Refuse Discovery to a Party to an Arbitration Agreement and is There a Difference Between Pre-Action and Pre-Arbitral Discovery?*

The Court of Appeal had the opportunity to consider the relationship between civil procedure and arbitration proceedings in the case of *Woh Hup (Pte) Ltd and Others v Lian Teck Construction Pte Ltd*.⁵⁰ In this case, the respondent commenced proceedings in the court and also sought pre-action discovery against the appellants. The appellants appealed to the High Court on the grounds that the matter was within the scope of an arbitration clause between the parties and that the court had no power to grant pre-arbitral discovery. The appellant's appeal was, however, dismissed as the respondent clearly demonstrated its intention to bring the case before the courts and as such the application for discovery was a pre-action discovery within the discretion of the judge to grant or refuse.

The court held that the term "pre-arbitral discovery" should be restricted to discovery sought before the commencement of arbitral proceedings *per se*. Thus, any discovery sought before the commencement of legal proceedings and for its purposes, whether or not it was sought by a party to an arbitration agreement, should still be termed "pre-action discovery". The appellants' contentions that the application was for pre-arbitral discovery were rejected as the fact that the respondent intended to sue the appellants in court had been expressly stated on affidavit. Thus, the respondent's application was ultimately for pre-action discovery.⁵¹

The court also held that it was not appropriate to consider the applicability of an arbitration clause at the hearing of a discovery application. The appropriate time to do so would be when a party commences an action, which the other party could object to on the basis that it involved a matter that was the subject of an arbitration agreement. It would then be for the court to grant or to refuse a stay of proceedings.⁵² A party to an arbitration agreement could still apply to the court for pre-action discovery prior to commencing legal proceedings, and the court had jurisdiction to hear and grant such an application.⁵³ However, to avoid abuse or indiscriminate applications, where there is likelihood that the matter were the subject of an arbitration agreement, the court could exercise its discretion by refusing to grant discovery.⁵⁴ The test for this is whether, on the facts and circumstances of the case and upon a plain literal reading of the arbitration provision, the scope of the arbitration agreement *prima facie* applied to the case before it.⁵⁵

⁵⁰ [2005] S.G.C.A. 26.

⁵¹ *Ibid.* at paras. 21 and 26.

⁵² *Supra* note 50 at para. 32.

⁵³ *Supra* note 50 at para. 33. The court noted that an arbitration clause does not operate as a bar to commencing legal proceedings as parties may not have agreed to oust the court's jurisdiction, citing the decision of the court in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 Sing.L.R. 168 at 172.

⁵⁴ It would have been good if the court had the opportunity to clarify the issue of whether it had jurisdiction to order pre-arbitral discovery. Nevertheless, it expressed doubt, albeit *obiter*, that that was so; *supra* note 50 at para. 36.

⁵⁵ *Supra* note 50 at paras. 34-35.

